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No. 98-500

In the Supreme Court of the United States

OCTOBER TERM, 1998

ANDREW HOLMES, ET AL., PETITIONERS

v.

CALIFORNIA ARMY NATIONAL GUARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Act of Congress governing homosexual conduct in the military, 10 U.S.C. 654, requires separation of members who, like petitioners, state that they are homosexuals and fail to rebut the presumption arising from that statement that they have engaged in, or have a propensity to engage in, homosexual acts. The question presented is:

Whether 10 U.S.C. 654 and petitioners' discharges under it are consistent with equal protection and the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 124 F.3d 1126. The opinions of the district courts (Pet. App. 25a-42a and 43a-78a) are reported at 918 F. Supp 1403 and 920 F. Supp. 1510.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1997. A petition for rehearing was denied on April 6, 1998 (Pet. App. 25a). Petitioners filed a petition for a writ of certiorari on July 6, 1998 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In enacting 10 U.S.C. 654 (Pet. App. 84a-87a), which governs homosexual conduct in the military, Congress found that the longstanding "prohibition against homosexual conduct * * * continues to be necessary in the unique circumstances of military service." 10 U.S.C. 654(a)(13) (Pet. App. 85a). Congress also determined (10 U.S.C. 654(a)(15); Pet. App. 85a):

> The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

Accordingly, the Act provides for separation from service if a member has: (1) "engaged in, attempted to engage in, or solicited another to engage in a homosexual act"; (2) "stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts"; or (3) "married or attempted to marry a person known to be of the same biological sex." 10 U.S.C. 654(b)(1)-(3); Pet. App. 86a.[1]

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[1] The Act defines "homosexual act" as "(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A)." 10 U.S.C. 654(f)(3); Pet. App. 87a.

2. Pursuant to statutory provisions for the issuance of implementing regulations and procedures, the Department of Defense promulgated several directives to govern separations under the Act. DoD Directive No. 1332.30 (Pet. App. 88a-110a), applicable to officers, governs this case, and a substantially similar directive, DoD Directive No. 1332.14, applies to enlisted personnel. To implement the "statements" provision of the Act (10 U.S.C. 654(b)(2)), DoD Directive No. 1332.30 provides that a statement by an officer that he "is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the officer engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." DoD Dir. No. 1332.30 ¶ C.1.b; Pet. App. 95a. The officer is "given the opportunity to rebut the presumption by presenting evidence" to an administrative board "demonstrating that he * * * does not engage in, attempt to engage in, have a propensity to engage in or intend to engage in homosexual acts." *Ibid.*

A "[p]ropensity to engage in homosexual acts" is defined as "more than an abstract preference or desire to engage in homosexual acts; it indicates a *likelihood* that a person engages in or will engage in homosexual acts." DoD Dir. No. 1332.30, Defs. ¶ 13; Pet. App. 92a (emphasis added). By contrast, sexual orientation —defined as "[a]n abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts" (DoD Dir. No. 1332.30, Defs. ¶ 16; Pet. App. 92a)—"is considered a personal and private matter, and is not a bar to continued service * * * unless manifested by homosexual

conduct." DoD Dir. No. 1332.30 ¶ C; Pet. App. 94a.[2] An officer's statement that he is a homosexual "is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts." DoD Dir. No. 1332.30 ¶ C; Pet. App. 94a. The Directive also sets forth the types of evidence an officer may offer to rebut the presumption. DoD Dir. No. 1332.30 ¶ C.1.b; Pet. App. 95a.

3. Lieutenants Holmes and Watson were ordered discharged from the Army National Guard and the Navy respectively based on their statements that they were homosexuals, or words to that effect, and their failure to rebut the presumption arising from their statements that they engage in, or are likely to engage in, homosexual acts. Pet. App. 7a-9a. They brought separate actions challenging their discharges, arguing, as relevant here, that 10 U.S.C. 654(b)(2) violated their rights to equal protection and to freedom of speech under the First Amendment.

The District Court for the Northern District of California entered summary judgment for Holmes, holding that Section 654 violated equal protection and the First Amendment. Pet. App. 81a. Specifically, the court held that the presumption in Section 654(b)(2), which is triggered by a statement of homosexual orientation, unconstitutionally punished Holmes for speech and for status as a homosexual, rather than for

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[2] "Homosexual conduct" is defined by the directive as "a homosexual act, a statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage." DoD Dir. No. 1332.30, Defs. ¶ 9; Pet. App. 92a.

conduct. Pet. App. 64a-80a. The Government appealed.[3]

The District Court for the Western District of Washington rejected Watson's claims and entered summary judgment for the government. Pet. App. 45a. The court held that the military's policy, on its face, did not violate equal protection or the First Amendment because it was based on a likelihood of validly proscribable homosexual acts that is reasonably inferred from a service member's statements. *Id.* at 35a-39a, 45a. The court also rejected Watson's as-applied challenge, finding that Watson's statements manifested an intent or propensity—which Watson failed to rebut—to engage in off-base, off-duty homosexual acts with nonmilitary personnel. *Id.* at 39a-42a, 45a. Watson appealed.[4]

4. The Ninth Circuit consolidated the two cases on appeal and upheld the constitutionality of the statutory policy. Regarding equal protection, the court observed that court of appeals precedent firmly establishes that the military has a "legitimate interest" in excluding service members who engage in homosexual acts "in order to maintain effective armed forces." Pet. App. 13a. The court then held that Congress acted rationally in presuming that a declared homosexual engages in, or likely will engage in, homosexual acts. *Id.* at 15a-16a. The court found that the policy provides service members

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[3] Although the district court ordered that Holmes be reinstated, Holmes stipulated that he would not seek reinstatement pending appeal. Pet. App. 10a.

[4] Until recently, Watson served on active duty pursuant to an injunctive order. Pet. App. 8a. However, by order dated August 18, 1998, the Ninth Circuit vacated the injunctive order without prejudice to Watson's litigative rights, and Watson received an honorable discharge on September 1, 1998.

with a meaningful opportunity to rebut the presumption of homosexual acts. *Id.* at 16a-17a.

Thus, the court held, petitioners' statements of homosexuality did not automatically lead to their discharges; rather, their statements were "coupled with their tacit acceptance of the link between their orientation and their conduct, as evidenced by their failure to show" that they did not engage in, and were not likely to engage in, homosexual acts. Pet. App. 16a. The Ninth Circuit therefore held that the challenged statutory classification did not offend equal protection, because it was based on a reasonable inference of homosexual acts that are validly prohibited in the special military context. *Ibid.*

The Ninth Circuit also sustained the policy against petitioners' First Amendment challenge, holding that because petitioners were "discharged for their conduct and not for speech, the First Amendment is not implicated." Pet. App. 18a. The court explained that petitioners' statements that they are homosexuals, "like most admissions, w[ere] made in speech, but that does not mean that the [F]irst [A]mendment precludes the use of the admission[s] as evidence of the facts admitted." *Ibid.* (quoting *Pruitt* v. *Cheney*, 963 F.2d 1160, 1164 (9th Cir. 1991), cert. denied, 506 U.S. 1020 (1992)).[5]

5. The Ninth Circuit then denied petitioners' joint petition for rehearing and rejected their suggestion of rehearing en banc. Pet. App. 25a-26a. Five judges

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[5] Judge Reinhardt dissented. Pet. App. 18a-24a. In his view, the policy, "while purporting to allow homosexuals to serve in this country's armed forces, unconstitutionally conditions their service on an abridgment of their free speech rights under the First Amendment." Pet. App. 24a.

dissented from the denial of rehearing en banc. *Id.* at 26a.

ARGUMENT

The decision below is correct and in accord with the decisions of the three other courts of appeals that have considered the validity of the Act of Congress governing homosexual conduct in the military.[6] See *Thomasson* v. *Perry*, 80 F.3d 915 (4th Cir.) (en banc), cert. denied, 519 U.S. 948 (1996); *Selland* v. *Perry*, 905 F. Supp. 260 (D. Md. 1995), aff'd, 100 F.3d 950 (4th Cir. 1996) (Table), cert. denied, 520 U.S. 1210 (1997); *Richenberg* v. *Perry*, 97 F.3d 256 (8th Cir. 1996), cert. denied, 118 S. Ct. 45 (1997); *Able* v. *United States*, 88 F.3d 1280 (2d Cir. 1996) (sustaining Act against First Amendment and equal protection challenge, provided its underlying prohibition of homosexual acts is valid); after remand, *Able* v. *United States*, 153 F.3d 628 (2d Cir. 1998) (sustaining Act's prohibition of homosexual acts), petition for reh'g pending, No. 97-6205; *Philips* v. *Perry*, 106 F.3d 1420 (9th Cir. 1997) (sustaining Act's prohibition of homosexual acts); *Thorne* v. *Department of Defense*, 139 F.3d 893 (4th Cir. 1997), cert. denied, No. 98-91 (Oct. 19, 1998). This Court recently denied certiorari in four of those cases (*Thomasson*, *Selland*, *Richenberg* and *Thorne*), all of which presented First Amendment and equal protection issues similar to those presented in this case. There has been no change in circumstances that would warrant a different result

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[6] Petitioners erroneously state (Pet. 10) that only "two circuits" have upheld 10 U.S.C. 654. As shown above, four circuits—the Second, Fourth, Eighth, and Ninth Circuits—have sustained the constitutionality of the Act of Congress governing homosexual conduct in the military.

here. Accordingly, the petition for a writ of certiorari should be denied.

1. The Ninth Circuit correctly rejected petitioners' argument (Pet. 11-18) that 10 U.S.C. 654 and its implementing directive violate equal protection. In sustaining the validity of the military's acts-directed policy, the decision below comports with nearly twenty years of precedent in which that court and every other court of appeals to consider the issue have upheld the constitutionality of the military's authority to discharge service members who engage in homosexual acts. Pet. App. 13a. Contrary to petitioners' contention (Pet. 11-13), the Ninth Circuit did not err in deferring to the judgment of the Legislative and Executive Branches, as well as military leaders, that service members with a propensity or intent to engage in homosexual acts should also be excluded as a means of fostering the legitimate aims of maintaining unit cohesion, protecting privacy interests, and minimizing sexual tensions. Pet. App. 3a-6a. This Court repeatedly has held that "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules for their governance is challenged." *Goldman* v. *Weinberger*, 475 U.S. 503, 508 (1986). Deference is especially warranted here, where "the challenged restriction and its constitutionality [were] extensively considered by Congress in hearings, committee and floor debate." *Philips* v. *Perry*, 106 F.3d at 1425 (citing *Rostker* v. *Goldberg*, 453 U.S. 57, 64, 72 (1981)). Additionally, the judiciary must "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Goldman*, 475 U.S. at 507. Thus, in considering the validity of 10 U.S.C. 654, the Ninth Circuit —quite correctly—was

"particularly careful not to substitute [its] judgment of what is desirable for that of Congress, or [its] own evaluation of evidence for a reasonable evaluation by the Legislative Branch." *Rostker*, 453 U.S. at 68.

Given the legitimate statutory aims, furthered by 10 U.S.C. 654, of promoting unit cohesion, accommodating personal privacy, and reducing sexual tension among service members, the Ninth Circuit correctly rejected (Pet. App. 13a) the same argument that petitioners make here—namely, that the Act is impermissibly based on invidious or irrational prejudice (Pet. 14). As the court held in *Philips*, "[w]e cannot say that the [military's] concerns are based on 'mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable' by the military. Nor can we say that avoiding sexual tensions lacks any 'footing in the realities' of the [military] environment." 106 F.3d at 1429 (citations omitted). The Second, Fourth, and Eighth Circuits have similarly rejected the argument that the Act is based on impermissible prejudice. *Able*, 155 F.3d at 634-636; *Thomasson*, 80 F.3d at 927-931; *Richenberg*, 97 F.3d at 261.

Petitioners err in asserting (Pet. 17) that the Act is irrational in presuming, subject to rebuttal, that a service member who declares that he is a homosexual has a propensity to engage in homosexual acts. The Ninth Circuit correctly held that "it is rational to assume that both homosexuals and heterosexuals are likely to act in accordance with their sexual drives." Pet. App. 15a-16a (quoting *Richenberg*, 97 F.3d at 262, and *Steffan* v. *Perry*, 41 F.3d 677, 692 (D.C. Cir. 1994) (en banc)) (internal quotation marks omitted). Accord *Able*, 88 F.3d at 1296; *Thomasson*, 80 F.3d at 930. That the policy accords a member a meaningful opportunity to rebut the presumption (Pet. App. 16a-17a) renders

the policy all the more fair and confirms that it is acts-directed.[7]

Finally, petitioners' reliance (Pet. 15) on *Romer* v. *Evans*, 517 U.S. 620 (1996), is misplaced because there are at least four important distinctions between Amendment 2 to the Colorado Constitution at issue in *Romer* and the Act of Congress challenged here. First, 10 U.S.C. 654, which concerns military service by persons who engage in homosexual conduct, is much narrower in scope than Colorado's Amendment 2, which this Court described as a "sweeping" and "unprecedented" measure that withdrew from homosexuals the "protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society," so much so as to "deem a class of persons a stranger to its laws." 517 U.S. at 627, 631, 633, 635. Second, *Romer* arose in the civilian context and does not affect precedents, such as *Parker* v. *Levy*, 417 U.S. 733, 756 (1974), holding that "Congress is permitted to legislate both with greater breadth and with greater flexibility" in the military context. See *Rostker* v. *Goldberg*, *supra* (sustaining men-only draft law). Third, Colorado's Amendment 2

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[7] Contrary to petitioners' contention (Pet. 17), *Robinson* v. *California*, 370 U.S. 660 (1962), *Powell* v. *Texas*, 392 U.S. 514 (1968), and *Jacobson* v. *United States*, 503 U.S. 540 (1992), do not cast doubt on the validity of the presumption. Those cases involved presumptions arising from a defendant's status in the context of *criminal* proceedings, where "[p]unishment for a status is particularly obnoxious, and in many instances can reasonably be called cruel and unusual." *Powell*, 392 U.S. at 543 (Black, J., concurring). Section 654, in contrast, involves an administrative separation from the military, which is not a criminal proceeding and does not impose punishment. See *Garret* v. *Lehman*, 751 F.2d 997, 1002-1003 (9th Cir. 1985).

classified on the basis of homosexual status (517 U.S. at 635), while the Act of Congress at issue here classifies on the basis of past or likely future prohibited homosexual acts. Fourth and most important, the Act challenged here serves the legitimate objectives of prohibiting homosexual acts in the military, promoting unit cohesion, protecting privacy interests, and reducing sexual tensions, while this Court found that Amendment 2 had no legitimate objective. *Ibid.*[8]

2. The court of appeals also correctly held that the Act of Congress governing homosexual conduct in the military is consistent with the First Amendment. The Act treats a service member's statement that he is a homosexual as a basis from which to presume, in the absence of rebuttal by him, that he is a "homosexual" as defined by the Act, *i.e.*, one "who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." 10 U.S.C. 654(f)(1). The Ninth Circuit correctly held (Pet. App. 18a) that the First Amendment does not prohibit such evidentiary use of a service member's statement. *Able*, 88 F.3d at 1292-1300; *Thomasson*, 80 F.3d at 931-934. See *Wayte* v. *United States*, 470 U.S. 598 (1985). Petitioners were afforded the opportunity to rebut the presumption in their administrative hearings, but failed to do so. Pet. App. 16a. In addition, expressive conduct may be restricted in the military context if it is "likely to

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[8] Petitioners' suggestion (Pet. 17) that certiorari should be granted to resolve a conflict between this case and *Meinhold* v. *Department of Defense*, 34 F.3d 1469 (9th Cir. 1994), lacks merit. Certiorari is not warranted to resolve allegedly inconsistent intracircuit decisions. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Moreover, as the Ninth Circuit's analysis plainly shows (Pet. App. 14a, 16a), this case is readily distinguishable from its prior decision in *Meinhold*.

interfere with * * * vital prerequisites for military effectiveness." *Brown* v. *Glines*, 444 U.S. 348, 354 (1980). The express legislative findings supporting the Act of Congress at issue (see 10 U.S.C. 654(a)) show that that test is met here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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